



**Homeart Limited v Diamond Trust Bank (K) Ltd & another (Civil Case E144 of 2024)
[2024] KEHC 13782 (KLR) (Commercial and Tax) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E144 OF 2024
JWW MONG'ARE, J
NOVEMBER 5, 2024**

BETWEEN

HOMEART LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK (K) LTD 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion dated 15th March 2024 seeking a temporary injunction do issue restraining the 1st and 2nd Respondent, its agents and/or assigns or anyone acting under them from selling either by private treaty or public auction, advertising for sale, disposing of, selling or otherwise interfering with Apartment Numbers 303 erected on Land Reference Number 1/602; 705 erected on Land Reference Number 1/780 (Original 1/695/2); 503 and 703 erected on Land Reference Number 1/602 Number 402 erected on Land Reference Number 1/708 (Original 1/695/2) Nairobi.
2. Further, in the alternative, the Applicant seeks for the Court to order and/or direct the maintenance of status quo in terms of the occupation, ownership, possession and use, over and in respect of the above-mentioned property.
3. The Application is based on the grounds raised on the face of the application as well as a Supporting Affidavit dated 15th March 2024 sworn by LIBAN MAHDI.
4. In response, the 1st Respondent was opposed though the Replying Affidavit sworn by FAITH NDONGA sworn on 24th April 2024 who stated that the Applicant breached the express terms of the aforesaid facilities in that the borrowers failed and/or neglected to make payment punctually as and when the same fell due, thus causing the facilities to be in arrears of Kshs.48,295,209.42/= as at 3rd



August 2023. Consequently, the Respondent argues that there exists no basis for the granting of an injunction to prevent a mortgagee from exercising its Statutory Power of Sale.

Analysis and Determination

5. I have carefully considered the Application and the responses filed therein together with the written rival submissions and I note that the only issue that arises for the courts determination is; whether the Applicant has met the threshold for grant of injunctive orders.
6. It is now well settled law that the granting of injunctive reliefs is a discretionary exercise predicated upon 3 interdependent and sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience. See: *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Ltd v. Jan Bonde Nielsen & 2 Others*, [2014] eKLR.
7. Since the court is called to consider the three element sequentially, the court will now examine whether the Applicant has established a prima facie case. Parties agree and it is undisputed that the Applicant was advanced various financial facilities by the Defendant. The Respondent argues that the Applicant failed and/or neglected to make payment as and when the same fell due thus causing the facilities to be in arrears. In addition, the Respondent submitted that despite repeated demands to the Applicant to settle the arrears the Applicant refused and/or neglected to do so.
8. Though the Applicant does not dispute that it owes the Defendant however, the Applicant contends there are discrepancies in the accrued interest being demanded by the Defendant. Further, that the Respondent charge accrued interest per day on the aggregate of the principal loan amounts exponentially increasing the amounts due and payable by the Applicant. That, this mode of charging interest exacerbated the Plaintiff's inability to complete the repayment of the loans as the amounts said to be due are grossly exaggerated and punitive.
9. In this instance, the Applicant needed to demonstrate a prima facie case with probability of success at trial. In *Mrao Ltd Vs First American Bank of Kenya and 2 others* (2003) KLR 123, the court described prima facie case as:

“ A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.
10. In light of the above, it is clear that a prima facie case therefore means more than an arguable case; that the evidence must show an infringement of a right and the probability of success of the applicant's case at the trial. It is notable that the Applicant has not supported the allegations of erroneous interest with any evidence neither did the Applicant raise the same in its letter dated 4th November 2023 addressed to the Respondent when the Applicant acknowledged that the amount owed as at May 2023 stood at Kshs.85,000,000/=.
11. Further, the Applicant has all along been aware of the outstanding amount, interest and penalties as the Defendant has been sharing statements of accounts which have never been challenged. Equally, the Applicant on its own admission stated that its business is not operational due to the lack of business and that the company was no longer a going concern and this only further explains that the Applicant has clearly been unable to pay its debts.



12. It appears from my analysis of the material placed before this court that the Applicant has not brought to light what rights have been infringed by the Defendant in its issuing of the notices required by law in exercise of its statutory power of sale. It is not enough for a party to argue that there are discrepancies on the interest charged and this court, without being provided with the necessary evidence, cannot make a finding on mere allegations. I find therefore that the Applicant does not indicate the infringement of any right that warrants the grant of an order of injunction. Subsequently and in view of the above, the court notes that the Applicant has thus failed to demonstrate that it has established a prima facie case as envisioned by the Mrao case(supra).
13. Flowing from the above finding and in line with the holding in the Nguruman Case(supra) that the court needs to consider the elements in a sequential manner such that if the first one fails there would be no need to consider the other two, the court is of the opinion that having not established a prima facie case; there is consequently no need to interrogate the other two limbs that is, whether the Applicant would suffer irreparably if there is no injunction or where the balance of convenience tilts.
14. In sum, this Court finds that the Applicant has failed to demonstrate that he is deserving of the orders sought. The upshot of the foregoing is that the court finds and holds that the Application before it is not merited and the same is dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF NOVEMBER 2024

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J.W.W. MONG'ARE

JUDGE

In The Presence Of

Ms. Wanjau holding brief for Mr. Hassan for the Plaintiff/ Applicant.

Mr. Kisinga for the Defendant/Respondent.

Amos - Court Assistant

